

which closed captioning would constitute an economic burden.⁴⁴ The Conference Report -- which is "the most persuasive evidence of congressional intent" after the statutory language⁴⁵ -- adopted the House version of Section 713.⁴⁶ With minor modifications, Section 713(d)(1), as enacted, was the same as originally proposed by the House in its predecessor Section 204(d)(1). As explained in both the Conference Report and the House Report, the statute empowers the Commission to grant exemptions for "specific programs, or classes or programs, or entire services" from the closed captioning requirements.⁴⁷ Thus, there is no doubt that Congress intended and did grant authority to the Commission to exempt specific "programs" or "services."⁴⁸

44 The Weather Channel believes that the language of the statute is clear and that resort to legislative history is unnecessary. Nonetheless, the legislative history supports The Weather Channel's position.

45 See Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981).

46 See Conference Report at 184 ("The conference agreement adopts the House provision.").

47 See Conference Report at 182; House Report at 114 (emphasis added).

48 Moreover, section 713(d)(1) authorizes the Commission to "exempt by regulation" specific programs, classes of programs and regulations. See 47 U.S.C. § 613(d)(1). The legislative history clarifies that "[a]ny exemption" granted under Section 713(d)(1) "should . . . us[e] the information collected during the [Commission's Section 713(a)] inquiry, and should be based on a finding that the provision of closed captioning would be economically burdensome." See Conference Report at 183; House

Finally, exemption of individual services and classes of services in this proceeding will conserve Commission and programmer resources and streamline significantly the implementation of the 1996 Act's closed captioning provision. Grant of individual exemptions in this proceeding will reduce the number of cases the Commission will have to adjudicate under the ad hoc "undue burden" procedures of Section 713(d)(3). There is no reason to require programmers to repeat analyses submitted in this proceeding in a second proceeding under the Section 713(d)(3) "undue burden" test. Furthermore, immediate grant or rejection of individual exemptions in this proceeding will result in a more efficient allocation of the limited available captioning resources.⁴⁹

IV. THE WEATHER CHANNEL ALSO IS ELIGIBLE FOR AN EXEMPTION AS PART OF THE CLASS OF "PRIMARILY TEXTUAL" SERVICES.

In the NPRM, the Commission proposes to exempt from closed captioning the entire class of programming "that is primarily textual" since the "information is already provided visually, with little or no relevant audio track."⁵⁰ The Weather Channel

Report at 114 (emphasis added). This language plainly directs the Commission to consider exemptions for individual services as part of this rulemaking proceeding.

⁴⁹ As noted, the Commission has recognized that there is an insufficient number of adequately trained stenocaptioners to accommodate the volume of new captioning work that will be generated by Section 713. See, e.g., NPRM at ¶ 23.

⁵⁰ See NPRM at ¶ 73.

supports that class exemption and believes that its programming fits comfortably within the definition of "primarily textual."

As discussed above, The Weather Channel's programming is conveyed primarily via text, graphs, charts, etc. (as opposed to audio). For that reason, The Weather Channel is distinguishable from the type of weather programming which the NPRM proposes to exclude from its general exemption for certain classes of video programming.⁵¹ According to the NPRM, "a significant amount of information is conveyed in the audio portion" of weather programming "which is not captured by the graphics accompanying the report."⁵² That conclusion stemmed from the NPRM's assumption that "satellite pictures" are "an integral part of most weather programs" and that such pictures "are difficult to comprehend without the meteorologist's oral explanation."⁵³ While that may be true of the weather reports offered by local or national broadcasters, The Weather Channel's programming is fundamentally different from those types of weather programming.

As explained above, The Weather Channel's local feed and its emergency notices and bulletins consist entirely of text and graphics with no accompanying voice-overs. Thus, the NPRM's concerns regarding emergency notification and safety are

⁵¹ See NPRM at ¶ 83 (declining to exempt weather programming).

⁵² Id.

⁵³ Id.

unwarranted.⁵⁴ Similarly, The Weather Channel uses extensive text and graphics in its national and international weather programming. The audio portion of those feeds is largely redundant of the text and graphics on-screen. (As noted, The Weather Channel estimates that 70% of its national and international programming is fully comprehensible without audio.) Moreover, the Weather Channel is in the process of updating its graphics and text for certain maps, replacing them with newer versions, more easily comprehensible by hearing-impaired viewers.

In summary, The Weather Channel's local and emergency programming is all textual and graphic, and its national and international programming is predominantly textual and graphic. Consequently, The Weather Channel should be exempt from closed captioning as part of the class of programming that is "primarily textual in nature."⁵⁵

⁵⁴ See NPRM at ¶ 83 & n.164 (Because weather can "directly affect health and safety concerns, we tentatively conclude that it would be inappropriate to include weather programming in our general exemptions from our captioning requirements.").

⁵⁵ A second reason the NPRM gave for declining to exempt weather programming is that "to the extent that weather reports are part of local news programming, we do not believe that the captioning is economically burdensome" because weather reports "can be scripted and . . . converted to captioning at virtually no cost using the ENR method . . . that is common at many local stations." See NPRM at ¶ 83. Aside from the fact that The Weather Channel is not part of any "local news" report, its local feeds are without audio and, moreover, virtually all of The Weather Channel's live programming is unscripted.

V. THE COMMISSION SHOULD ESTABLISH REBUTTABLE PRESUMPTIONS TO STREAMLINE THE REVIEW OF "UNDUE BURDEN" PETITIONS UNDER SECTION 713(d)(3).

The NPRM solicits comment on the factors the Commission should consider when evaluating petitions for exemptions under the undue burden standard of Section 713(d)(3).⁵⁶ Of course, the Commission must begin with the non-exclusive factors contained in the statute itself.⁵⁷ As discussed below, the Commission should also incorporate the following rebuttable presumptions. The use of rebuttable presumptions will, similar to the exemption of individual programmers, lead to more efficient use of limited captioning resources and will conserve Commission and programmer resources, as well. Finally, to the extent that programming satisfies more than one presumption category, the presumption against closed-captioning should be concomitantly more difficult to rebut.

A. 24-Hour Live, Unscripted Programming Should Be Presumed To Be Unduly Burdensome To Close-Caption.

Program services that provide 24-hour live programming should be presumed unduly burdensome to caption, particularly where such programming is unscripted. The Commission has

⁵⁶ See NPRM at ¶ 91.

⁵⁷ See 47 U.S.C. § 613(e) (requiring Commission to review (1) the nature/cost of close captioning the programming, (2) the impact on the operation of the provider or programmer, (3) the provider's or programmer's financial resources, and (4) the provider's or programmer's type of operations. See also NPRM at ¶ 58.

recognized that captioning live events is "expensive" and could run in excess of one to ten million dollars annually.⁵⁸ That figure does not take into account the many other costs and complexities of captioning on a live basis, 24-hours a day.

For example, because of the intense nature of captioning live programming, The Weather Channel estimates that a single captioner can only live-caption for a maximum of 15 minutes at a single sitting, at which point the captioner must take a short break.⁵⁹ Thus, captioning would compel 24-hour live programmers to maintain a large staff of trained stenocaptioners who would be available at all times. Moreover, as stated previously, live captioning is fraught with inaccuracies not associated with off-line captioning.⁶⁰ In the case of The Weather Channel, such errors are compounded by the fact that by the time the captioning appears, the associated graph or picture may have already disappeared from the screen. In light of the significant costs and technical problems associated with captioning a live 24 hour network, the Commission should presume that live, unscripted, programming need not be captioned.

⁵⁸ See NPRM at ¶¶ 20 & 115. See also Part II.B.1, supra (converting hourly estimates for captioning into annual costs).

⁵⁹ Discussions with various captioning companies revealed that real-time captioners are able to caption only about four hours of programming during an eight-hour shift.

⁶⁰ The Commission should always balance the "need for closed captioned programming against the possibility of inhibiting the production and distribution of programming." See NPRM at ¶ 90.

B. Perishable Programming Should Be Presumed Unduly Burdensome To Close Caption.

Perishable, programming -- programming that is of value to viewers for only a limited duration -- should be presumed unduly burdensome to close-caption. Because such programming may be used only once, the costs of captioning cannot be recouped over multiple distributions. That is especially true of weather programming for which there is no audience for yesterday's or last week's weather conditions. Thus, in the absence of facts to the contrary, it should be presumed that such programming is unduly burdensome to close caption.

C. Programming In Which Audio Information Is Simultaneously Reproduced In Graphical Or Textual Form Should Not Be Required To Be Close-Captioned.

The Commission should presume that closed-captioning is unnecessary if the programming depicts essentially all of the audio information graphically or textually on-screen. Programming which largely duplicates its audio component in a graphical or textual format already is accessible to the hearing impaired and therefore satisfies Congress' goal of providing access to those viewers. Consequently, captioning would impose significant costs while conveying only marginal benefits. Congress recognized that captioning need not be pursued under such circumstances.⁶¹

⁶¹ See House Report at 115 (authorizing Commission to grant "undue burden" exemptions).

D. The Commission Should Presume That Programming Need Not Be Close-Captioned If Doing So Would Diminish The Information Being Provided To The Deaf And Hearing Impaired.

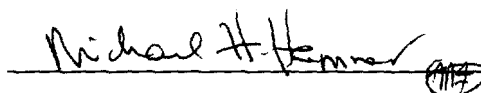
Congress intended Section 713 to increase accessibility of programming to the deaf and hearing impaired.⁶² To the extent such captioning is detrimental to the hearing impaired, it should not be required. For example, as shown above, captioning graphically or textually intense programming might obscure or cover over portions of the graphic or textual information already on-screen; thus, it would actually diminish the information available to the hearing impaired. Congress clearly did not intend the Commission to adopt rigid closed captioning rules which actually reduced access to information for the hearing impaired. Consequently, a presumption that no captioning is necessary should apply in these circumstances.

⁶² See Conference Report at 182, House Report at 113.

VI. CONCLUSION.

For the reasons stated above, the Commission should, in this proceeding, grant The Weather Channel a closed caption exemption, either as an individual service or as part of the "primarily textual" class.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Michael H. Hammer", is written over a horizontal line. To the right of the signature is a small, circular stamp or mark.

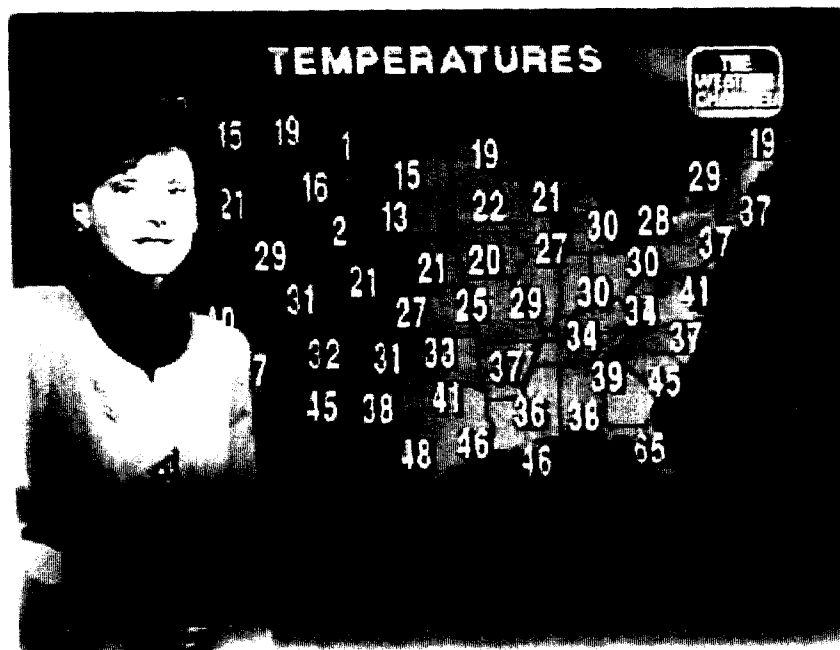
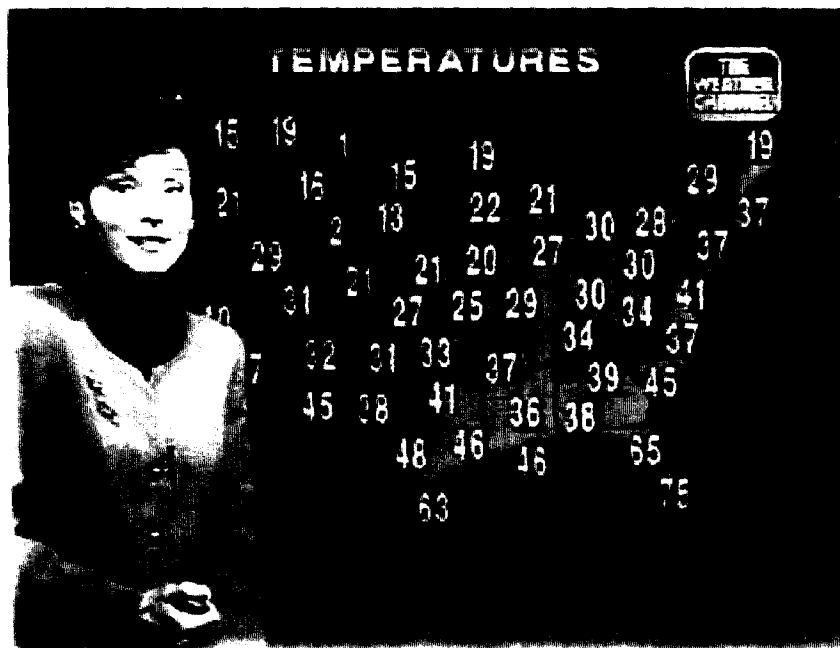
Michael H. Hammer
Michael F. Finn
Jennifer L. Desmond

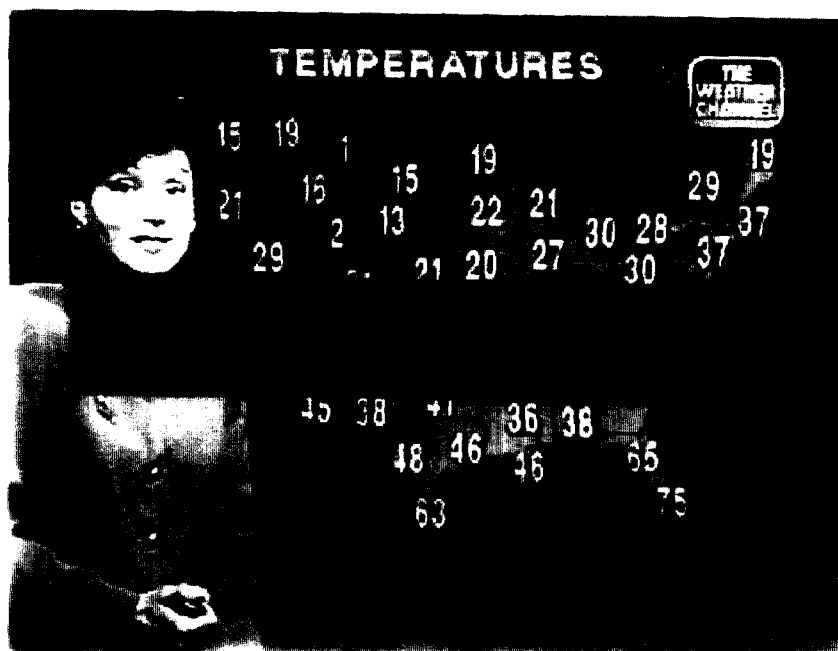
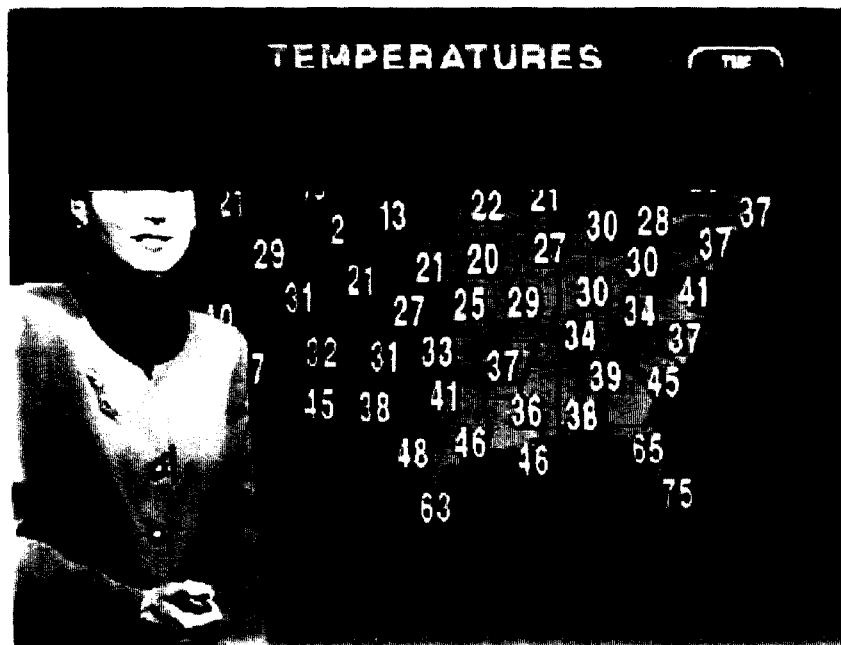
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W. Suite 600
Washington, D.C. 20036

Attorneys for The Weather Channel

February 28, 1997

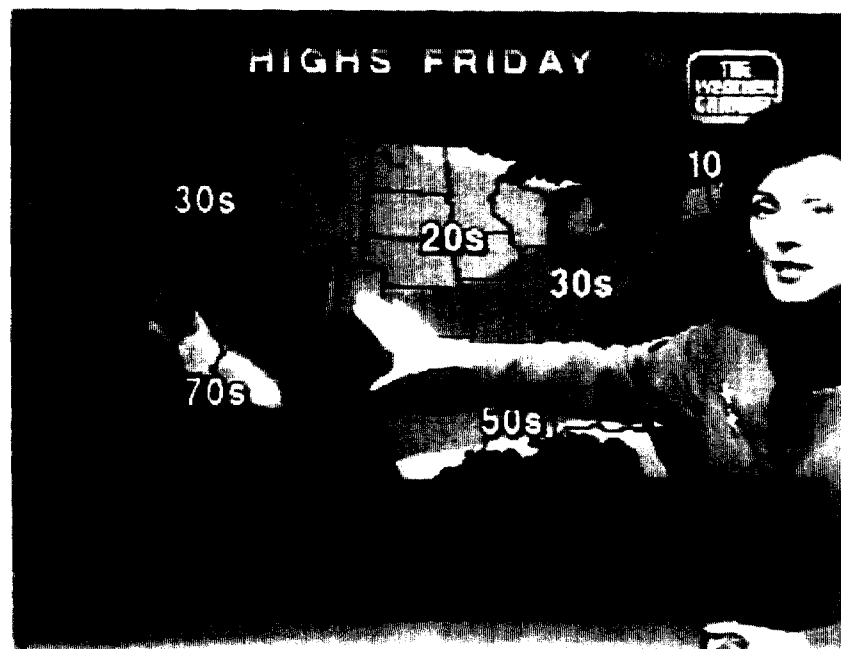
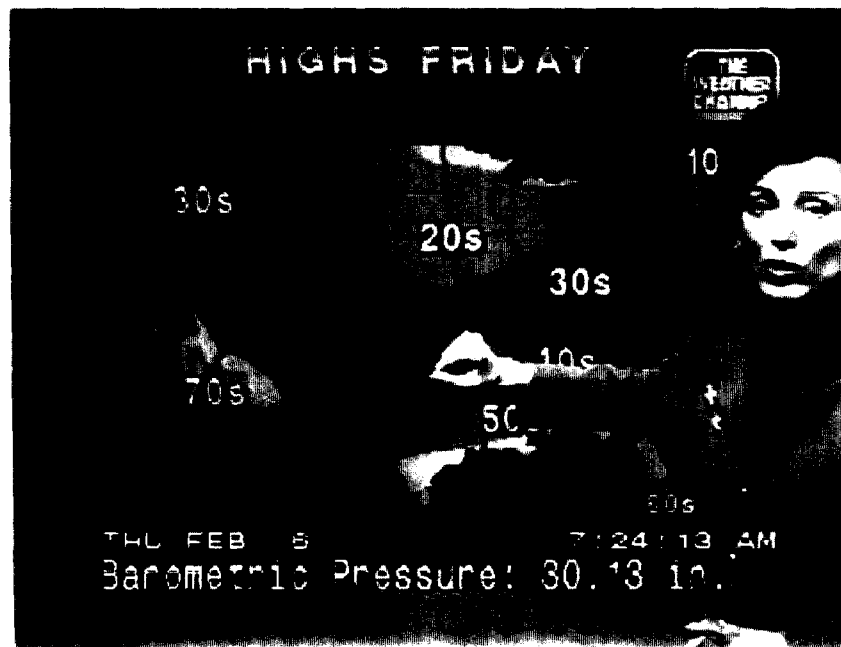
ATTACHMENT A
National Temperature Display

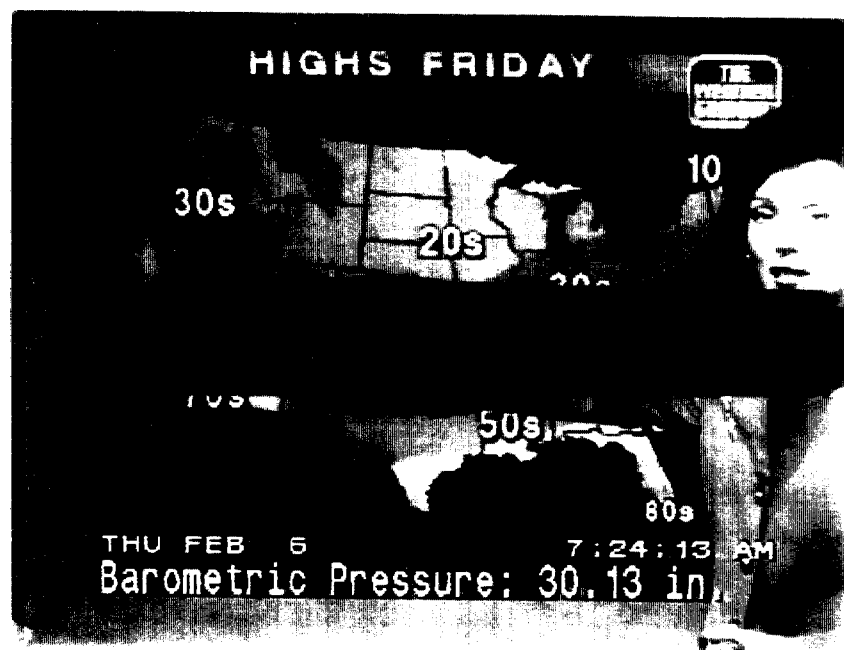
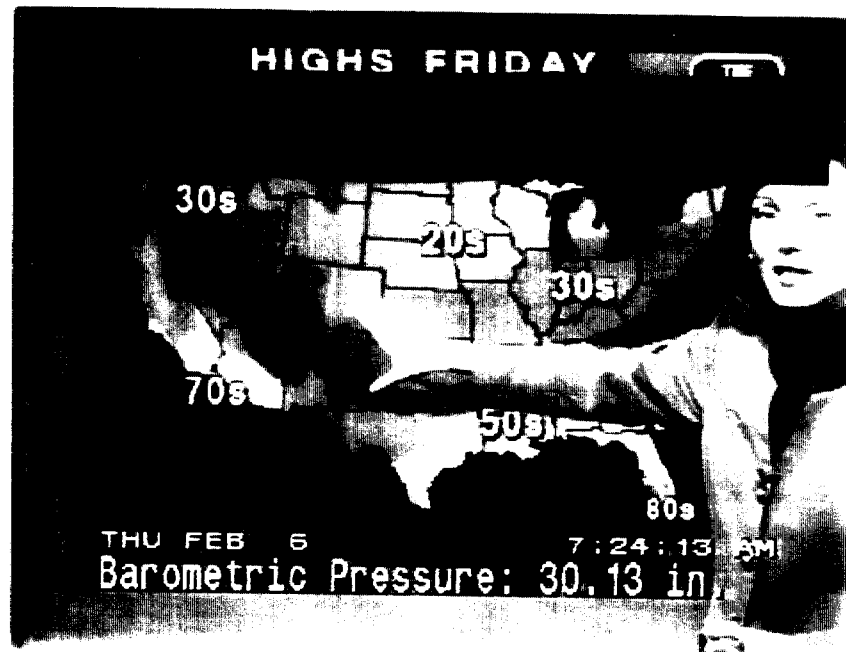




ATTACHMENT B

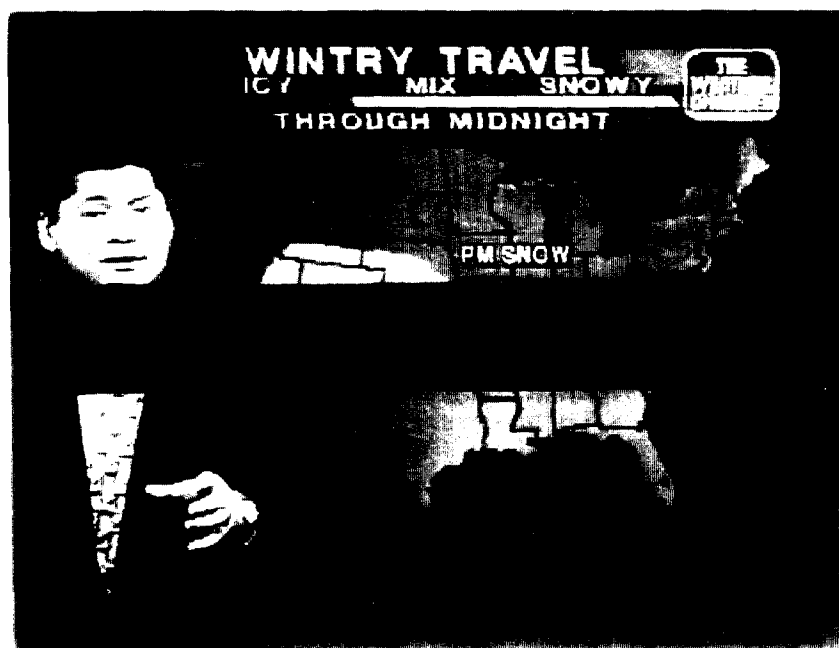
**NATIONAL TEMPERATUARE DISPAY
WITH LOCAL WEATHER OVERLAY AT
BOTTOM 1/3**



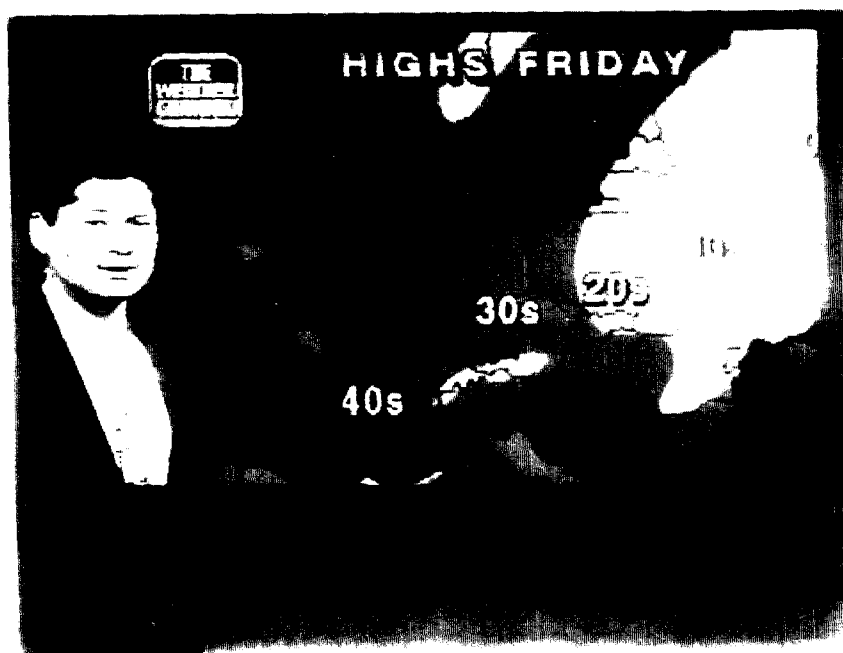
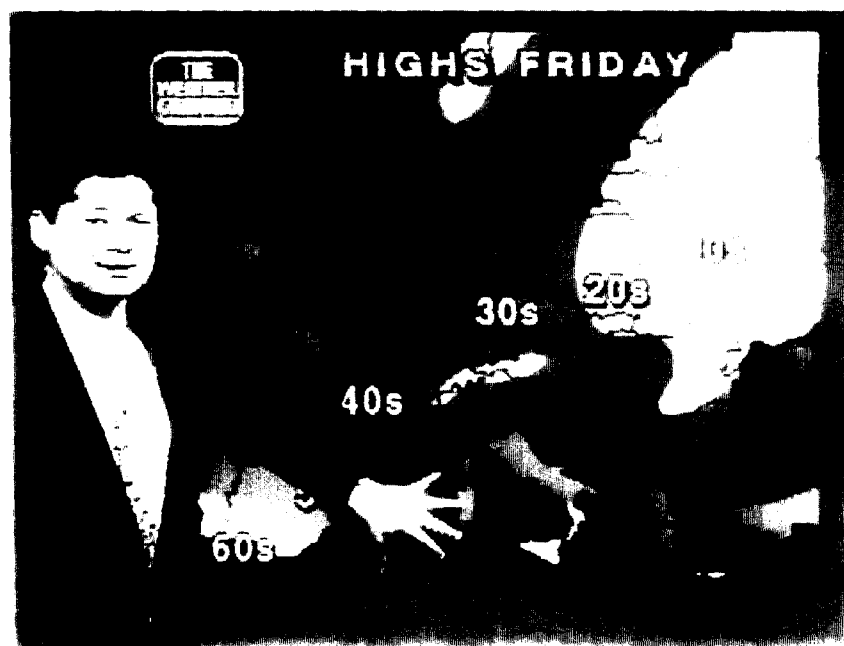


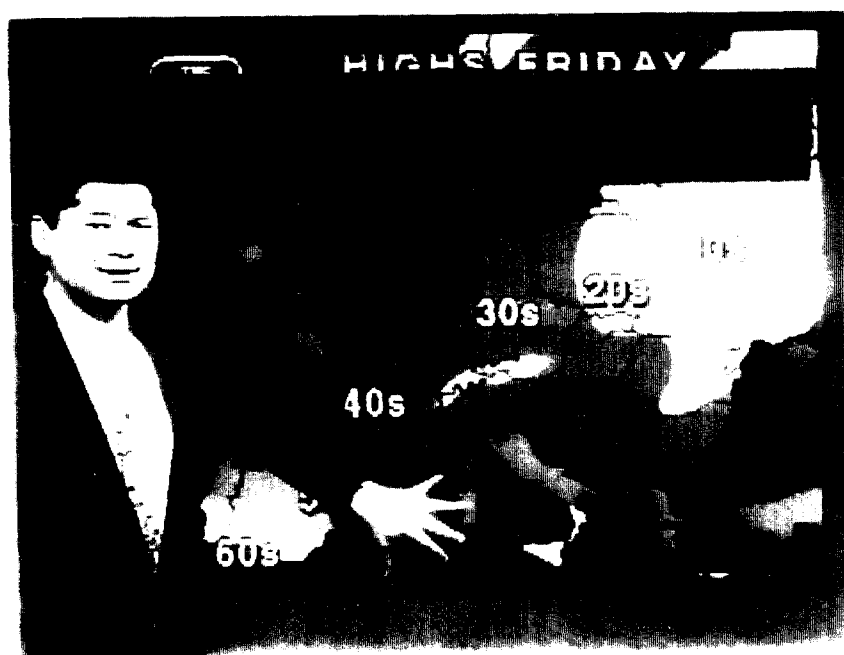
ATTACHMENT C
WINTER TRAVEL CONDITIONS



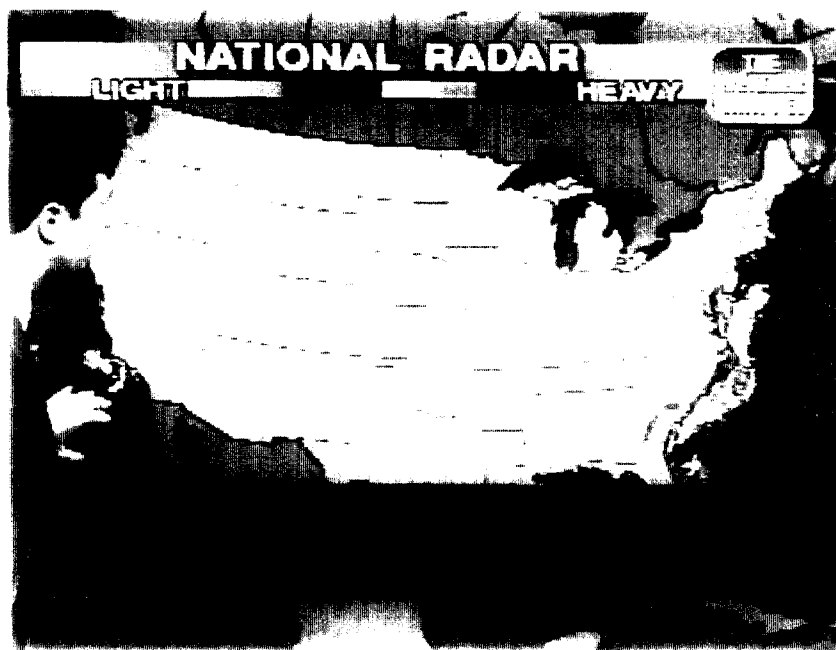
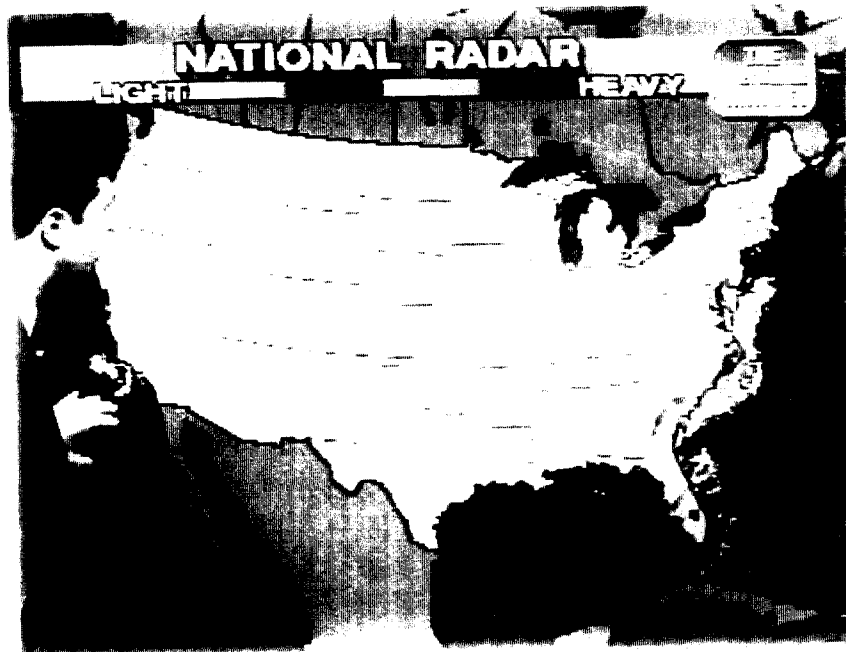


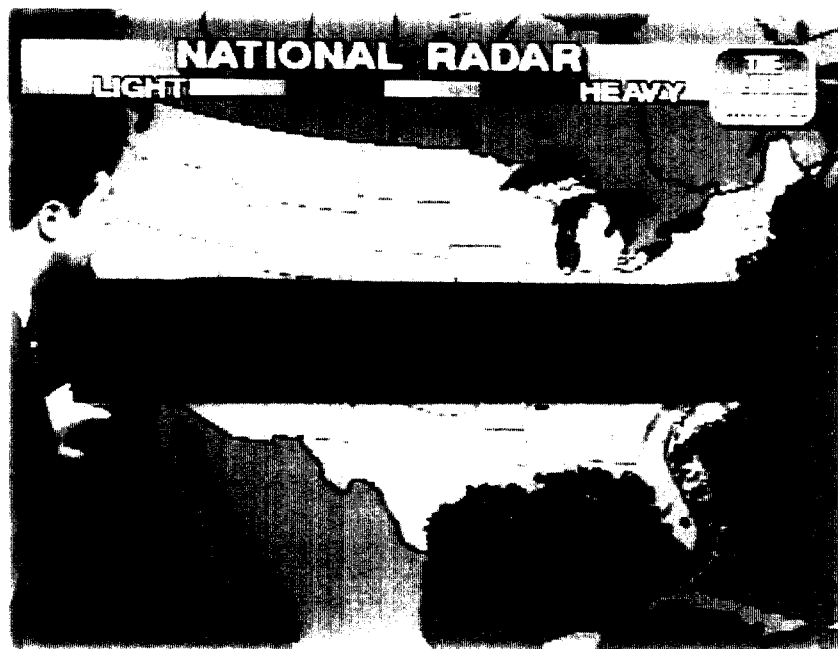
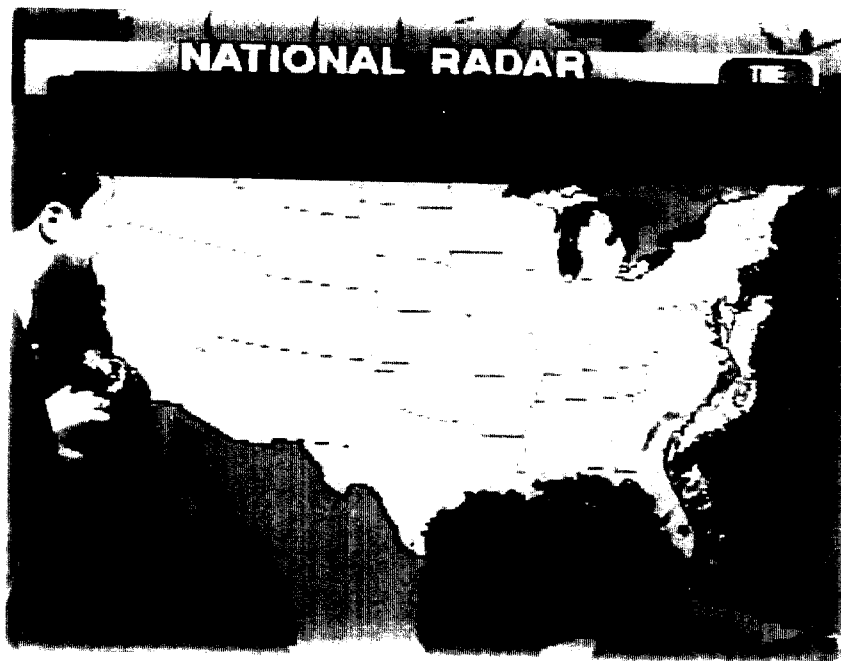
ATTACHMENT D
TEMPERATURE DISPLAY - EUROPE





ATTACHMENT E
NATIONAL PRECIPITATION DISPLAY





ATTACHMENT F
EMERGENCY BULLETIN - FULL SCREEN